applications would be processed:

> By this *Notice*, we retain the existing stay of the new Part 22 licensing rules until competitive bidding procedures are established in this proceeding. We will therefore process 931 MHz CCP applications which were pending prior to the adoption of this *Notice*, and for which the 60-day window for filing competing applications has expired, under the application procedures in effect prior to January 1, 1995. Consequently, pending 931 MHz CCP applications that are not mutually exclusive with other applications will be processed, while mutually exclusive applications will be held pending the outcome of this proceeding. *Notice*, at ¶ 144.

II. Standard of Substantive "Arbitrary and Capricious" Review

Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, expressly vests a reviewing court with the right to hold unlawful and set aside any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA particularly proscribes the failure to draw reasoned distinctions where reasoned distinctions are required.[4] An agency is required to take a "hard look" at all relevant issues and considered reasonable alternatives to its decided course of action.[5] A decision resting solely on a ground that does not justify the result reached is arbitrary and capricious. *MCI Telecommunications Corp. v. FCC*, 10 F. 3rd 842, 846 (D.C. Cir. 1993). An agency changing its course must supply

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[4] *American Trucking Associations, Inc. v. I.C.C.*, 697 F. 2d 1146, 1150 (D.C. Cir. 1983).

[5] *Neighborhood Television Co. v. F.C.C.*, 742 F. 2d 629, 639 (1984); *Telocator Network v. F.C.C.*, 691 F. 2d 525, 545 (D.C. Cir. 1982) (agency must consider all relevant factors); *Action For Children's Television v. F.C.C.*, 564 F. 2d 458, 478-79 (D.C. Cir. 1977) (agency must give relative factors a "hard look").

reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms. *Telecommunications Research and Action Committee v. FCC*, 800 F. 2d 1181, 1184 (D.C. Cir. 1986). See also *Achernar Broadcasting Co. v. FCC*, 62 F. 3d 1441 (D.C. Cir. 1995) (the Commission must fully articulate a new policy if it has truly adopted one).

III. The Commission Must Follow Its Own Rules

It is a well-settled rule of law that an agency must adhere to its own rules and regulations.[6] In addition, once an agency agrees to allow exceptions to a rule it must provide a rational explanation if it later refuses to allow exceptions in cases that appear similar.[7] It is patently unfair to allow disparate treatment of similarly-situated applicants.[8]

IV. Prior Notice Required

Generally, the Administrative Procedure Act requires that each

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[6] "A precept which lies at the foundation of the modern administrative state is that agencies must abide by their rules and regulations"

Reuters Ltd. v. F.C.C, 781 F. 2d 946, 947, 950 (D.C. Cir. 1986). See also *Schering Corp. v. Shalala*, 995 F. 2d 1103, 1105 (D.C. Cir. 1993).

[7] *Green County Mobilephone, Inc. v. F.C.C*, 765 F. 2d 235, 237 (D.C. Cir 1985).

[8] *Melody Music, Inc. v F.C.C.*, 345 F. 2d 730 (D.C. Cir. 1965).

agency give notice of substantive rules of general applicability, as well as statements of general policy or interpretation formulated by an agency.[9] This Court has held that when the sanction imposed by a stringent processing standard is as drastic as dismissal, elementary fairness requires explicit notice of the conditions for dismissal.[10] The less forgiving the FCC's processing standard, the more precise its requirements must be. *Id.*[11] Consequently, substantive rules can only be created through the rulemaking process.[12]

V. Date of Imposition of Freeze is Incorrectly Computed

The Commission stated in the *Notice* that the effective date of the freeze was the date of the adoption of the *Notice*. This is erroneous. By application of law, notice occurred on February 9, 1996, when the *Notice* was released.

The Commission's Rules state that public notice of rulemaking documents occurs either on the date of publication in the Federal

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[9] 5 U.S.C. § 552(A)(1)(D), (E). The section further provides that "a person may not in any manner.. be adversely affected by ... a matter required to be published in the Federal Register and not so published." *Id.*

[10] *Salzer v. F.C.C*, 778 F. 2d 869, 875 (D.C. Cir. 1985)

[11] *See also Bamford v. F.C.C*, 535 F. 2d 78, 82 (D.C. Cir.) ("Elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected."), *cert. denied*, 429 U.S. 895, 97 S. Ct. 255, 50 L. Ed 2d 178 (1976); *Radio Athens, Inc. v. F.C.C*, 401 F. 2d 398, 404 (D.C. Cir. 1968) ("When the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration.")

[12] 5 USC 553 (B) and (C). See also *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979); *Lindz v. Heckler*, 800 F. 2d 871, 878 (9th Cir. 1986).

Register or on the release date of the document itself.[13] No person is expected to comply with any requirement or policy of the Commission unless he has actual notice of that requirement or policy.[14] Consequently, any attempt to preclude applicants' rights pursuant to the interim rules may not pre-date February 9, 1996.

VI. The FCC's Interim Rules Proposal Is Illegal

A. Interim Rules Are Impermissibly Retroactive

The Commission's action with respect to applications filed in accordance with existing FCC Rules is unfair and constitutes an unreasonable retroactive application of the Commission's own Rules. It is well-settled that the retroactive application of administrative rules and policies is looked upon with great disfavor by the courts.[15] When implementing regulations or policies and procedures with retroactive application, the Commission must balance the "mischief" caused by such regulation against the "salutary" or beneficial effects, if any, which reviewing courts, in turn, must critically review on appeal to ensure that competing considerations have been properly

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[13] 47 C.F.R. Section 1.4(b)(1) and (3).

[14] 47 CFR §0.445(e).

[15] *See, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 208 (1988)(retroactivity is not favored in law); *Yakima Valley Cablevision v. FCC*, 794 F. 2d 737, 745 (D.C. Cir. 1986) ("Courts have long hesitated to permit retroactive rulemaking and have noted its troubling nature.")

considered.[16]

The retroactive extension of the freeze and interim processing rules to pending 931 MHz paging applications, filed as they were in accordance with the Rules and policies of the Commission then in effect at the time of filing, does not comply with the policy just articulated. This action would not appropriately strike the balance between the significant mischief of disrupting the normal and routine 931 MHz paging licensing process and depriving applicants of their rights and equitable expectancies, versus the dubious benefit of auctioning spectrum which, as the Commission itself admits in the *Notice*,[17] is already heavily licensed.

Under the interim proposal, Commission action will be withheld on any pending 931 MHz or lowband CCP application that, as of February 8, 1996, the *Notice* adoption date, was within the period for filing mutually exclusive applications. As a result, all 931 MHz applications accepted for filing after the Public Notice released December 6, 1995, are frozen until WT Docket No. 96-18 has been resolved. This freeze is impermissibly retroactive and patently arbitrary and capricious.

The freeze has an impermissible retrospective effect. It will prevent the processing of applications filed as long ago as November, 1995! It will certainly prevent the processing of

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[16] *Yakima Valley Cablevision*, 794 F. 2d 745-46; *See Securities and Exchange Commission v. Chenery*, 332 U.S. 194, 203 (1947).

[17] See *Notice*, at ¶13 ("According to our records, CCP channels are heavily licensed, particularly in major markets.")

applications filed by Petitioners, all of whom were filed and/or placed on Public Notice between November 22, 1995 and February 8, 1996. When these applications were filed, however, there was absolutely no basis provided by the Commission for anticipating that they would ever be subject to an *ex post facto* freeze.

The interim processing rules constitute a "rule" under the APA.[18] Thus the interim processing rules' legal consequences must be wholly prospective, unless Congress expressly conveyed the power to promulgate retroactive rules to the Commission.[19] The Communications Act conveys no such express power, and no other statutory basis for such power is cited in the *Notice*. Thus the Commission's attempt to impose a retroactive freeze is illegal.

Indeed, the courts have ruled that the Commission cannot dismiss applications which were timely filed in accordance with the rules prior to the effective date of a freeze. Such applications are entitled to consideration under the doctrine of *Kessler v. FCC*, 326 F. 2d 673 (D.C. Cir. 1963). In *Kessler*, the U.S. Court of Appeals for the D.C. Circuit concluded, in the context of a freeze

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[18] The APA's definition of a "rule" states in pertinent part that a rule

> means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency...

5 U.S.C. §551(4) (emphasis added).

[19] *Bowen v. Georgetown University Hospital*, 488 US 204, 208 (1988) (retroactive rulemaking prohibited unless authorized by statute).

on the acceptance of new AM applications, that applicants who tendered their applications prior to the first day of a freeze were entitled to participate in a comparative hearing on that application and that the Commission could not deprive them of this right when their applications were timely but were rejected only because of a temporary freeze. *Id.*, at 688.

B. No Notice and Comment As Required

The Commission cannot argue that the interim processing rules are procedural in nature, and thus are exempt from the notice and comment requirements of the APA. The exception for procedural rules must be construed very narrowly and is plainly inapplicable where the rule in question alters substantive rights and interests.[20] In determining whether an agency rule is substantive and thus subject to the notice-and-comment provisions of Section 553(b), courts must look at the rule's effect on those interests ultimately at stake in the agency proceeding.[21]

The interim processing rules, which include the application freeze, are substantive in nature because they fail the test articulated in *Pickus*, i.e., these rules will have a direct effect

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[20] National Association of Home Health Agencies v. Schweiker, 690 F. 2d 932, 949 (D.C. Cir. 1982), cert. denied, 459 U.S. 1205, 103 S. Ct. 1193, 75 L. Ed. 2d 438 (1983) (APA exemption from the notice and comment requirement does not apply to agency action which as a substantial impact on substantive rights and interests);

[21] Neighborhood TV CO., Inc. v. F.C.C, 742 F. 2d 629 (1984), citing Pickus v. United States Board of Parole, 507 F. 2d 1107 (D. C. Cir. 1974) (parole board guidelines were substantive because they "were the kind calculated to have a substantial effect on the ultimate parole decisions" (emphasis supplied).

on the ultimate disposition of the subject applications. The Commission has made it clear that it will adopt auction rules.[22] In fact, the Commission announced its intention to adopt auction rules in its *Part 22 Rewrite Order*, supra. The Commission has also made it clear that once it has adopted the new auction rules,it will dismiss applications still pending, in order to clear the way for such auction. *Notice* at ¶ 144.[23] The Commission could not hold applications in abeyance and then dismiss them as part of the auction process without the imposition of a freeze. In fact, the only reason a freeze is necessary at all is to accomplish this effect.[24] Since the ultimate effect of the freeze, used in conjunction with the final auction rules ultimately adopted, will be the dismissal of Petitioners' applications, applications which were not subject to dismissal for such reasons on the date they were filed, these new rules will have a substantial effect on the Commission's ultimate disposition. Consequently, the interim rules

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[22] See Notice at ¶¶ 1, 71-136.

[23] The Commission indicates in the *Notice* that it has used this procedure with other existing services. See *Notice*, at footnote 270.

[24] See Comments of John D.Pellegrin, Chartered, filed in WT Docket No. 96-18 and PP Docket No. 93-253, on March 1, 1996 ("there is no valid reason to institute a freeze at all in this situation. The Commission could simply announce it will utilize auctions for those applications which proved ultimately to be mutually exclusive after the new rules are established.") In addition, the Commission has previously stated its approval of the general use of public notices and cut-offs, with auctions to resolve mutual exclusivity as it occurs, for CMRS services. *See In The Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Third Report and order, 9 FCC Rcd 7988, 8135 (1994).

are substantive, and the failure to subject them to notice and comment is illegal.

VII. Interim Processing Rules Violate Communications Act

A. Value of Frequency

The Commission's interim processing rules, and particularly the filing freeze, are admittedly driven by its desire to make applicants pay for paging frequencies. The proposed rules will have the direct effect of either preserving the number of licenses currently issued or in fact reducing that number, making geographic paging licenses available at auction in the future more valuable to prospective bidders.

Section 309(j)(7)(A) of the Communications Act provides that, in making a decision to prescribe area designations and bandwidth assignments:

> ... the Commission may not base a finding of public interest, convenience and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection. (emphasis supplied)

It is manifestly clear that the Commission is doing just that if it establishes rules in contemplation of the value of paging spectrum, while at the same time it penalizes applicants already on file in favor of potential, as yet unidentified bidders for paging licenses.[25]

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[25] In fact, since the Commission is forbidden by statute to consider the revenues generated by auctions when instituting competitive bidding rules for a service, there is no reason why the Commission should institute a freeze at all. The Commission could simply utilize auctions for those applications which proved ultimately to be mutually exclusive after a date certain. Seen in this light, the only reason for a freeze is to maintain the "value" of the paging spectrum for future bidders, and to attempt to

Furthermore, what concern is it of the Commission's whether there is a great deal of spectrum available or, as observed in ¶13 of the *Notice*, that "there is relatively little desirable spectrum that remains available for licensing" on VHF and UHF paging channels in the 152 and 454 MHz bands.[26] Substitute the term "valuable" for "desirable", a reasonable synonym in this context, and the Commission's consideration of the worth of the spectrum is clear.

B. Statutory Objectives

In addition to the foregoing, to freeze paging applications for the sake of instituting paging auctions further contravenes the letter and spirit of the competitive bidding provisions in the Communications Act. Specifically, these provisions list statutory objectives such as the following:

1. "[D]evelopment and rapid deployment of new technologies, products and services.. without administrative or judicial delays.." See 47 U.S.C. § 309(j)(3)(A). Paging is not a new service, but rather, by the Commission's own admission, a mature industry.[27] Freezing paging applications to preserve the few paging frequencies remaining will not bring any "new technology, products or services" to the public. A paging freeze is simply an administrative delay, which Congress has specifically instructed

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increase federal revenues from auctions in impermissible fashion.

[26] The Commission notes that channels in the 931 MHz band "also are scarce in virtually all major markets and most mid-sized markets." *Notice* at ¶14.

[27] See *Notice*, ¶¶ 4-8.

the FCC to avoid.

2. "[P]romoting economic opportunity and competition.. and disseminating licenses among a wide variety of applicants." See 47 U.S.C. § 309(j)(3)(B). Paging is already a highly competitive industry, as the FCC itself has observed in the *Notice*. (See footnote 27, *supra*.) Licenses are already "disseminated among a wide variety of applicants", as there are numerous paging operators in nearly all markets. On the other hand, the freeze has erected barriers to new entrants into the paging marketplace. Consequently, the freeze will have the direct effect of decreasing competition in the paging industry.

VIII. Commission's Action is Arbitrary and Capricious

In defense of its own actions, the Commission states in the *Notice* that:

> We believe that after the public has been placed on notice of our proposed rule changes, continuing to accept new applications under the current rules would impair the objectives of this proceeding. We also note that this is consistent with the approach we have taken in other existing services where we have proposed to adopt geographic area licensing and auction rules. *Notice*, at ¶ 139. (emphasis supplied)

However, this approach is not consistent with the Commission's prior action taken with respect to 931 MHz paging licenses. The Commission in the *Part 22 Rewrite Order* established new rules specifically for the 931 MHz paging service. It proposed a solution which properly looked forward by establishing rules for applications filed in the future, while simultaneously proposing processing rules handling previously filed applications. No filing freeze was imposed, despite the fact that notice was given that

auction procedures would be established for applications filed in the future.

The Commission's treatment of applications pursuant to the recent *Part 22 Rewrite Order* completely belies the rationale for establishing an application freeze in the instant case, at least with respect to 931 MHz paging applications. Nor, as demonstrated above, is there any need for an application freeze in this case, as there was no need in the *Part 22 Rewrite* situation.

The Commission's proposed Rules are also a radical departure from the practice established in two recent Commission decisions.[28] In both cases, the Commission decided that equitable considerations barred the retroactive application of new rules to previously filed applications. The same equitable considerations are applicable in the instant situation, and the Commission should extend the same type of treatment to bar retroactivity in this case.

The Commission's specific language in its decision to implement auctions for the Multipoint Distribution Service underscores the arbitrary nature of the Commission's interim processing rules.[29] Commissioner Quello says quite forcefully and

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[28] *Multipoint Distribution Service (Filing Procedures and Competitive Bidding Rules)*, 78 RR 2d 856 (1995) ("MDS Order"); *Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7387 (1994) ("Cellular Unserved Order").

[29] *See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multichannel Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, 10 FCC Rcd 9589, 9754-57 (1995).

persuasively:

> The record does not evince any *mal fides* or intent to deceive by not constructing on the part of the applicants. We must therefore conclude that these applications were filed in good faith with the expectation that they would be processed under the rules in existence at the time of filing. Even though we have decided to modify the service somewhat we should not punish those applicants who were caught in the transition through no fault of their own. I believe that they have a significant vested equitable interest in having the applications that they paid fees to file processed in accordance with their expectations and the rules at that time.

Id., at 9754.

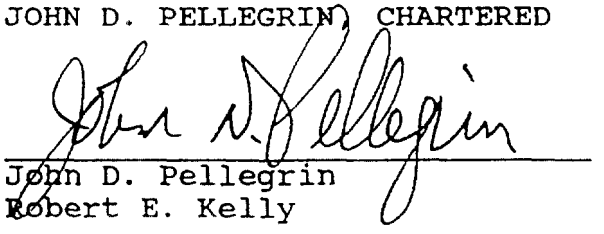
As the foregoing language illustrates, procedural fairness requires that the Commission process in accordance with its rules, any applications for paging facilities that were on file prior to the imposition of the freeze. These applicants followed the Commission's Rules, and expended significant efforts and resources in the preparation of their applications, including engineering studies and legal review. Each applicant also paid a filing fee to the FCC. Dismissal of these applications would be particularly unfair to the applicants because the combination of holiday leave, government furloughs, and closings due to winter weather no doubt delayed many applications from reaching Public Notice in a timely fashion. Therefore, the commencement of several relevant cut-off periods were delayed for reasons beyond the control of the Petitioners. The result is the arbitrary and capricious processing of the subject applications.

Wherefore, the above premises considered, it is respectfully requested that the Commission should reconsider its decision to

impose a freeze and adopt the interim processing rules, and accept and process Petitioners' applications at the earliest possible time.

Respectfully submitted,

JOHN D. PELLEGRIN, CHARTERED

By: 

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Dated: March 11, 1996

EXHIBIT ONE

Petitioners with Pending 931 MHz Applications

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cc: Commercial Wireless Division
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